

DEPARTMENT OF STATE REVENUE**LETTER OF FINDINGS NUMBER: 97-0437 ST
STATE GROSS RETAIL TAX
For Years 1994, 1995, AND 1996**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

- I. Sales/Use Tax**– Property sold and subsequently used out of state.

Authority: 45 IAC 2.2-5-54; IC § 6-8.1-5-4

Taxpayer protests the proposed assessment of use tax on property sold and subsequently used out of state.

- II. Sales/Use Tax**– Property shipped to taxpayer in Indiana for service and/or storage.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-4-1

Taxpayer protests the proposed assessment of use tax on customer's property used out of state and shipped to taxpayer from out of state for service and/or storage.

- III. Sales/Use Tax**– Out of state exemption certificate.

Authority: IC § 6-2.5-8-4; IC § 6-2.5-8-8

Taxpayer protests assessment of use tax on transactions where the customer provided an out of state exempt organization certificate.

IV. Sales/Use Tax– Labor charges.

Authority: 45 IAC 2.2-4-2

Taxpayer protests assessment of use tax on charges identified as labor rather than as tangible personal property sales.

STATEMENT OF FACTS

Taxpayer operates from a location in Indiana manufacturing, servicing (repair or renovation), storing and shipping displays. The displays range from point of sale stands to convention booths. The displays are shipped to purchasers by commercial carrier. For some displays, taxpayer will oversee the out of state set up and after the exhibit taxpayer will disassemble the display and ship it by commercial carrier back to taxpayer's Indiana location for storage and/or servicing of the display. Transactions between the customer and the taxpayer will sometimes occur in Indiana or via telephone.

I. Sales/Use Tax – Location of transaction for application of sales tax.

DISCUSSION

Tax was assessed on the transactions based on auditor's determination that the sale of the products at issue occurred in Indiana. Auditor noted that the items assessed were those that:

...the contract indicated that the customer came to Indianapolis to view and make approval of the display (sometimes during construction) and at the end of production. The taxpayer would bill the customer in most cases for the service of setting up and the disassemble of the display.

Taxpayer is protesting assessments on two grounds. The overlying issue for much of the taxpayer's protest is the audit's assessment of tax based on inferences drawn from taxpayer records during the audit. Taxpayer contends that many of the inferences resulting in assessment were not properly drawn. This issue revolves around the burden of proof in an audit situation, which IC § 6-8.1-5-4 defines as:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records.

The taxpayer, as the operator of the business, was logically the one individual in the position of controlling both the actions and the documentation of the actions of the business. Taxpayer's suggestion that the auditor was required to accept assertions as to

the nature of the transactions without documentation is not sustainable. To this end, as it relates to the remaining issues, their resolution is subject to the requirement of adequate documentation by taxpayer as to the circumstances of the transaction.

The second aspect of the taxpayer's protest is the assessment on displays shipped out of state, for use out of state and where the property is not intended to be subsequently used in, or returned to Indiana. Taxpayer cites 45 IAC 2.2-5-54(b), which provides:

Delivery to purchaser in a state other than Indiana. Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.

As auditor determined and the taxpayer contracts indicated, the sales did not occur to a purchaser "in a state other than Indiana." The transactions occurred in Indiana; consequently, 45 IAC 2.2-5-54 does not apply. The tax was properly assessed.

FINDINGS

Taxpayer protest is denied.

II. Sales/Use Tax– Property shipped to taxpayer in Indiana for service and/or storage.

DISCUSSION

The transactions in question involve exhibits, owned by the customer, prepared either by taxpayer or a similar business and used at an out of state location, and then shipped back to taxpayer's Indiana location for storage and/or renovation, modification, or repair until the exhibits are again needed for out of state use. An assessment was made on taxpayer's income from this activity. The use tax is imposed on transactions defined by IC § 6-2.5-3-2(a):

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

IC § 6-2.5-4-1(e) states;

The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) The price of the property transferred, without the rendition of any service;
- and

- (2) Except as provided in subsection (g)(*only applicable to gas and cigarette sales*), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

Inasmuch as the exhibits are not the property of the taxpayer, nor is there any transfer or sale of the property title in these transactions, no taxable transaction has occurred as defined by the above statutes; consequently the assessment does not apply.

FINDINGS

Taxpayer protest is sustained.

III. Sales/Use Tax– Out of state exemption certificate.

DISCUSSION

Taxpayer protest is based on IC § 6-2.5-8-8 that exempts taxpayer from collecting sales tax on purchases where the customer provided an exemption certificate to the taxpayer for materials sold in Indiana. IC § 6-2.5-8-4 states:

- (a) An organization, exempt from the state gross retail tax under IC § 6-2.5-5-21, IC § 6-2.5-5-25, or IC § 6-2.5-5-26, may register with the department as a purchaser of property in exempt transactions. An exempt organization wishing to register must file an application listing its principal location, but the organization is not required to pay the fee.
- (b) Upon receiving the application, the department may issue an exempt organization certificate containing a serial number and the principal location of the exempt organization.

IC § 6-2.5-8-8 states in relevant part:

A person authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue *the certificate on forms and in the manner prescribed by the department*. A seller accepting a *proper exemption certificate* under this section has no duty to collect or remit the state gross retail or use tax on that purchase. (*emphasis added*)

IC § 6-2.5-8-4 outlines the requirements and identifies an exempt organization certificate as a document issued by the Indiana Department of Revenue (Form ST-136A, INDOR

Indiana Out-of-state Purchasers Sales Tax Exemption Affidavit). IC § 6-2.5-8-8 references the exemption certificate with additional references as to Departmental requirements and reference to a “proper” certificate included with the grant of exemption.

Taxpayer presented out of state exemption certificates in lieu of the certificate described in IC § 6-2.5-8-4 and referenced in IC § 6-2.5-8-8. There is no provision for an exemption based on an out of state certificate; consequently, taxpayer’s protest is denied.

FINDINGS

Taxpayer protest is denied.

IV. Sales/Use Tax– Labor charges.

DISCUSSION

Taxpayer protested assessment on transactions taxpayer identified as labor rather than property sales. 45 IAC 2.2-4-2 states in relevant part, “Professional services, personal services, and services in respect to property not owned by the person rendering such services are not “transactions of a retail merchant constituting selling at retail”, and are not subject to gross retail tax.” Taxpayer position is correct.

FINDINGS

Taxpayer’s protest is sustained.